MIGRATION AND PUBLIC INTERNATIONAL LAW

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Abstract

Starting from the perception that international migration is a process that leads from the State of origin through transit countries and perhaps even the high sea up to the entry to the State of destination this paper discusses the impact of public international law on the various stages of migration. Relevant are in this respect the rules of customary and treaty law, but also the provisions of the Global Compact for Safe, Orderly and Regular Migration of 2018 which try to create a comprehensive frame-work for the multidimensional phenomenon of international migration. These provisions do not have the legal status of hard, i.e. legally binding law, but still intent to govern the said process of migration. On the first stage the right to leave the country of origin is decisive. On the second stage the rules established for the protection of the migrants' safety are addressed and exemplified by the existing rules for the rescue of lives in danger on the sea. At the third stage the rules for entering the country of destination become crucial. Actually here the territorial sovereignty of the State is decisive, but sovereignty is not absolute but bound by relevant customary international law as the prohibition of non-refoulement or by treaty obligations entered by the State itself. In this context the EU asylum law and the policy of pushbacks is dealt with. Issues of integration and acquisition of nationality are likewise tackled. Finally the basic view of the Global Compact at migration as a necessity and cornerstone of sustainable development leading to overemphasizing the benefits of migration vis-à-vis the difficulties of many States, especially with irregular migration, is critically assessed.

Keywords: Global Compact for Migration – State sovereignty – right to leave and enter a country – smuggling of migrants – non-refoulement – pushbacks

Introduction

Some general remarks

International migration today is and probably ever was a global phenomenon which likewise raises hopes and concerns. While some are afraid of the consequences of migration, at least if a huge number of migrants seek to enter their country, others have a more positive assessment. This is also the view of the UN Global Compact for Safe, Orderly and Regular Migration of 2018 (Global Compact/GCM): *"Migration has been part of the human experience throughout history, and we recognize that it is a source of prosperity, innovation and sustainable development in our globalized world, and that these positive impacts can be optimized by improving migration governance."* Only marginally it is mentioned that migration may affect countries *"in very different and sometimes unpredictable ways."*[1] It is quite obvious that migration as far as it is not confined to the territory of a certain country may easily interfere with the interests of other States, and therefore rules of international law might be helpful to avoid conflicts.[2] For this purpose and since all States are more or less affected by migration and at the same time *"no State can address migration alone"*,[3] the already mentioned Global Compact for Migration tries to establish a comprehensive regime for international migration for which all States should closely

[1] GCM no. 8, UN Doc. A/CONF.231/3 (30.7.2018); UN Doc. A/RES/73/195 (19.12.2018).
[2] This does not mean that internal migration is completely outside the reach of public international law as the human rights law demonstrates.
[3] See GCM nos 7, 11 and 15.

cooperate. The Global Compact was adopted by an international conference in Marrakesh and later supported in December 2018 by a UN General Assembly Resolution by a majority of 152 votes. But the fact that 5 States voted against (Czech Republic, Hungary, Israel, Poland and the United States of America), 12 abstained and 24 States did not participate equally shows the potential of difficulties and open questions which are connected with this project.

The Global Compact for Migration is rooting in the 2030 Agenda for Sustainable Development[4] and builds on the New York Declaration for Refugees and Migrants of 2016.[5] Together with the Global Compact on Refugees of 2018[6] it forms a broad basis for the statement of common principles, objectives and commitments.[7] Although refugees in the sense of the Geneva Convention on Refugees of 1951 and its Protocol of 1967 are also migrants, facing similar challenges and vulnerabilities and enjoying the same protection of universal human rights, migrants and refugees belong to two different groups governed by separate frameworks.[8] Only to refugees in the Convention's sense the specific rules of international refugee law apply. Therefore the Global Compact on Refugees (GCR) is mostly informed by the already existing legal norms of refugee law, while the Global Compact for Migration is a collection of vision, guiding principles, objectives and commitments not yet legally established, but may perhaps obtain at some time legal force.[9] In the following the specific rules of refugee law will therefore not be further discussed. Another distinction should also be pointed out. The Global Compact for Migration relates according to its denomination to regular migration only, but to a certain extent irregular migrants are dealt with. Irregular migrants are people who are illegally staying in a country and obligated immediately to leave, and no legal reason exists that would impede their departure.[10] But the status of irregular migrants does not get completely clear as far as the Compact is concerned. I shall come back to this issue in my concluding remarks.

Steering the process of migration

It is rational to see migration as a process from leaving a State, the State of origin, passing through transit States or the High Seas, up to the entry to the State of destination, where issues of the migrant's legal status, his or her integration up to a possible termination of the stay arise. I shall show in the following sections which rules of public international law can be applied to these different stages. As legal norms we have to take into account all the relevant rules of customary law, general principles of law and treaties.[11] However, we have also to draw upon the Global Compact for Migration though it is, by its own words, *"a non-legally binding, cooperative framework that builds on the commitments agreed upon by Member States in the New York Declaration for Refugees and Migrants."* It is further stated that the Compact *"upholds the sovereignty of States and their obligations under international law."*[12] Despite the non-legal character of the Compact it is expected that its "objectives and commitments" at least, as a frame-work, influence the ways and means how the process of migration is governed. An interesting question arises in this context. Why does the international community choose

[4] UN Doc. A/RES/70/1 (2015); GCM Nos 6 and 18.
[5] UN Doc. A/RES/ 71/1 (2016); GCM No. 3 GCM.
[6] Affirmed by UN Doc. A/RES/73/151 (17 December 2018).
[7] For a detailed negotiation history of the two Compacts see Micinski, N.R., "UN Global Compacts Governing Migrants and Refugees", Routledge New York, 2021, pp. 65 et seq.
[8] See GCM nos 3 and 4.
[9] Tomuschat, C., in Verfassungsrecht, Völkerrecht, Menschenrechte – Vom Recht im Zentrum der Internationalen Beziehungen. Festschrift für Ulrich Fastenrath, Groh, T. et al. (Editors), "Der UN-Migrationspakt", C.F. Müller Heidelberg, 2019, pp. 207-222 (209).
[10] Krajewski, M., "Status als Instrument des Migrationsrechts", 76 "Veröffentlichungen der Deutschen Staatsrechtslehrer" (VVDStRL), De Gruyter Berlin 2017, pp. 123 - 167 (146).
[11] Cf. Art. 38 Statute of the International Court of Justice.
[12] GCM no. 8, UN Doc. A/CONF.231/3 (30.7.2018); UN Doc. A/RES/73/195 (19.12.2018); This does not mean that internal migration is completely outside the reach of public international law as the human rights law demonstrates; See GCM nos 7, 11 and 15; UN Doc. A/RES/70/1 (2015); GCM Nos 6 and 18; UN Doc. A/RES/ 71/1 (2016); GCM No. 3 GCM; Affirmed by UN Doc. A/RES/73/151 (17 December 2018); For a detailed negotiation history of the two Compacts see Micinski, N.R., "UN Global Compacts Governing Migrants and Refugees", Routledge New York, 2021, pp. 65 et seq; See GCM nos 3 and 4; Tomuschat, cf. footnote 9, p. 209; Krajewski, cf. footnote 10, p. 146; Cf. Art. 38 Statute of the International Court of Justice; GCM no. 7.

a non-legally binding instrument instead a binding treaty in order to regulate the process of international migration? Again I have to refer to my closing remarks.

1. Leaving the country of origin

Leaving a country is primarily a matter of national law, but just in this regard international law has left deep footprints. They indicate a strong support for rules that guarantee for anybody the right to leave any country, including his or her own. One may point here to the respective articles of the International Covenant on Civil and Political Rights (Art. 12, para. 2, ICCPR), of Protocol No. 4 to the European Convention on Human Rights and Fundamental Freedoms (Art. 2, para. 2, ECHR), of the American Convention on Human Rights (Art. 22, para. 2 ACHR) and the African Charter of Human and Peoples' Rights (Art. 12, para.2, AChHPR). It is provided, however, that the States have the possibility to subject the right to leave to restrictions determined by law, if they are necessary to protect national security, public order, public health or morals or the rights and freedoms of others.[13] Of course one has to bear in mind that these treaties are obligating only those States which have ratified them and have not made admissible reservations to the relevant provisions. A customary law guaranty for leaving a State is probably not yet born. Thus, if a State is not bound by a relevant treaty provision there is at least no clear international legal support for leaving the country.

The Global Compact for Migration, too, does not contain an explicit provision concerning leaving. On the other hand the Compact in a more general way seems to favour such a right. This may be concluded from its No. 15 where one of the guiding principles is expressed as follows:

"By implementing the Global Compact, we ensure effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle"[14]

The stages include the starting point of migration from a certain territory. Furthermore, the States are asked to provide migrants with adequate documentation as proof of nationality and certificate of birth "at all stages of migration, as a means to empower migrants to effectively exercise their human rights".[15] This involves the right to leave a country for the sake of migration. The same can be followed from the Compact's Fifth Objective according to which "availability and flexibility of pathways for regular migration" should be enhanced.[16] But one has also to add that the States are called upon to cooperate in order to minimize adverse drivers and structural factors that compel people to leave by furthering resilience, disaster risk deduction and climate change mitigation, reduction of youth unemployment and avoidance of brain drain.[17] As normal as migration is seen in general, nobody should be forced to leave the own country. This clearly corresponds with the right of everyone lawfully within a country to freely choose his or her residence on this territory.[18]

2. Migrants on the move to the State of destination

In many cases migrants will have to pass other countries before they have the chance to arrive at the State of their destination. As we have to discuss in more detail later, there is usually no right to enter a foreign country. But in cases of orderly migration people will just travel through and leave the transit country as soon as possible. According to international law, States because of their territorial sovereignty

[13] See more generally Klein, E., in "Strengthening Human Rights Protections in Geneva, Israel, the West Bank and Beyond", David J. E. et al. (Editors), "On Limits and Restrictions of Human Rights", Cambridge University Press, 2021, pp. 10 – 39.
[14] These words are underlined by the statement that the Compact is "people-centred" and has a "strong human dimension", GCM no. 15; also Kotzur, M., "Migrationsbewegungen als Herausforderungen an das Völkerrecht", 49 "Berichte der deutschen Gesellschaft für Internationales Recht" , C.F. Müller Berlin, 2018, pp. 295 - 319 (303 et seq.).
[15] GCM no. 20.
[16] GCM no. 21.
[17] GCM no. 18.
[18] Cf. Art. 12, para.1 International Covenant on Civil and Political Rights (ICCPR).

have the power to admit or prohibit entry. In regular cases migrants have already received a transit visa or may get it upon arrival at the border.

On their way migrants may encounter many difficulties and dangers. Apart from the rules of the country concerned they are under the protection of the international human rights law as far as it is applicable. At any rate they can claim the rights having the character of peremptory norms of international law (jus cogens). Particularly endangered are so-called vulnerable people as elderly persons, women and children. One example is sexual and gender-based violence and trafficking in persons,[19] another is the smuggling of migrants. In both cases the General Compact takes a clear position: The States commit to intensify their joint efforts to prevent and counter such practices by adopting the appropriate legislative or other measures.[20]

The smuggling of migrants and the tragedies evolving there from are well-known. Thousands of people have lost their life while crossing the Aegean or Mediterranean Sea after having been brought by smugglers to inapt boats. The criminal nature of the smugglers is evident and generally acknowledged.[21] Less known are the obligations of States faced with such situations. Public international law contains important relevant rules. So Article 98 (1) of the UN Convention on the Law of the Sea (1982) provides a clearly framed provision of a duty to render assistance. The provision reads:

"1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him."[22]

One may also mention the International Convention for the Safety of Life at Sea (SOLAS, 1974) and International Convention on Maritime Search and Rescue (SAR, 1979) which both presuppose the need to save lives at sea and require States to be prepared for those events. The legal fundament for these Conventions is the human right to life that does not only avert interferences of States with the right, but also obliges them to take active protection measures against intrusions by third parties.[23] The right to respect life is guaranteed by all the universal and regional human rights conventions already mentioned (Art. 6 ICCPR; Art. 3 ECHR; Art. 4 AmCHR; Art. 4 AfCHPR). The Global Compact for Migration, in order to achieve its objective to save the lives of migrants mentions the commitment *"to cooperate internationally to save lives and prevent migrant death and injuries through individual or joint search and rescue operations (...)"*.[24]

In this context it might be interesting to have a short look at two decisions of the UN Human Rights Committee adopted in 2020. Both decisions concern the same facts. In October 2013 relatives of the author, Syrians like him, entered a fishing vessel anchored in a Libyan port. The vessel occupied with about 400 people including many children was shot a few hours after setting off by a boat flying a Berber flag, and the ship was going to sink. The emergency was announced to an emergency operator in Italy. After a while the operator explained that the vessel was in the Maltese search and rescue zone and transmitted the phone number of the Malta Rescue Centre. But only 5 to 6 hours later a Maltese boat and an Italian navy boat were on the spot, but the vessel had already capsized. Estimated more than 200 people died, among them the relatives of the author of the communication.

The first communication was addressed against Malta claiming that this State had violated the rights to life of the author's relatives. The Committee made clear that it saw the responsibility with Malta, because

[19] Yoon Jin Shin, "A Transnational Human Rights Approach to Human Trafficking", Brill Nijhoff Leiden Boston, 2018.
[20] GCM nos 25 and 26. See further Sarkin, J. J. and Morais, T., "Why States Need to View Their Responsibility to Protect Refugee and Asylum-Seeking Women Through the Lens of Intersectionality, Vulnerability and the Matrix of Domination to Address Sexual and Gender-Based Violence", "European Human Rights Law Review" 2022/6, pp. 534 – 570.
[21] GCM no. 25 GCM; however, the smuggled migrants shall not be liable to criminal prosecution, having been only objects of smuggling. This is perhaps too a one-sided view.
[22] Art. 98 (2) UNCLOS regulates obligations of coastal States regarding effective search and rescue service.
[23] Cf. "The Duty to Protect and to Ensure Human Rights", Klein, E., (Editor), Berlin Verlag Arno Spitz ", 2000.
[24] GCM Objective 8, no. 24.

it had effective control over the rescue operation. However, the Committee found the communication inadmissible, because the applicant had not exhausted the possible domestic remedies.[25]

The second communication was addressed against Italy. Here the Committee held that the State had violated the right to life (Art. 6, para. 1, ICCPR) and found that Italy has to make full reparation to individuals whose Covenant rights had been violated. Although the principal responsibility for the rescue operation lied with Malta (para.8.5), the Committee reasoned that Italy had failed to promptly respond to the emergency call by proceeding "with all possible speed to the rescue of persons in distress" according to Art. 98 UNCLOS and therefore failed to protect the life of many persons.[26]

The European Court of Human Rights (ECtHR), too, has underlined the responsibility of States to prevent danger for the life and physical integrity of migrants. The essential facts of the famous case *Hirsi Jamaa and others v. Italy* are as follows: the applicants had left Libya on vessels on their way to Italy, but became intercepted by boats of the Italian Revenue Police and Coastguard 35 nautical miles south of Lampedusa and were subsequently transferred to military ships and returned to Tripoli. Although there was a bilateral agreement between Italy and Libya to this effect the Court by its judgment of 2012 unanimously held that Italy had violated Art. 3 ECHR by exposing the applicants to the risk of inhuman and degrading treatment in Libya and arbitrary repatriation to Eritrea and Somalia.[27] We shall come back to the problem of push-backs later. In the Hirsi judgment the Court also found a violation of Art. 4 Fourth Protocol to the European Convention prohibiting collective expulsion.[28] It seems that the Court in its following jurisprudence narrowed down this prohibition in special circumstances.[29] In the *Melilla case* some people succeeded to overcome the border fence between Spain and Morocco, but were immediately returned to Morocco by Spain. The Court held that this action did not amount to collective expulsion, because the applicants had themselves brought into this situation and had created a "disruptive situation" and endangered public safety while effective means of legal entry were available.[30] Still later judgments made clear that there is no plain "exception of unlawfulness" for the prohibition of collective expulsion.[31] Rather the Court examines whether a disruptive situation was created and legal means of entry existed. If not, the Court finds a violation.[32] But if legal points of entry are available, persons entering the territory irregularly and in big numbers may be immediately returned. The Court deduced this result also from the obligation of the State to register all asylum seekers at the border.[33]

3. Arrival at and sojourn in the State of destination

3.1. Crossing border

Arrival at the State of destination presupposes the crossing of the border of this State. The basic truth is that there is no general right to enter a foreign country.[34] Such a right is only recognized with regard to the "own country", particularly to the State of nationality.[35] Usually foreigners will apply in advance for

[25] Decision of the Human Rights Committee in Case Communication No. 3043/2017, A.S. et al. v. Malta, 13 March 2020, UN Doc. CCPR/C/128/D/3043/2017, paras 1.1. – 7; see also the five dissenting votes.
[26] Views of the Human Rights Committee in Case Communication No. 3042/2017, A.S. et al. v. Italy, 4 November 2020, UN Doc. CCPR/C/130/D/3042/2017, paras 1.1. – 11; see also the nine individual opinions.
[27] Judgment of the European Court of Human Rights (ECtHR) in Case No. 27765/09 Hirsi Jamaa and others v. Italy, 23 February 2012 (rectified 16 November 2016), paras 85 et seq.
[28] Ibid., paras 159 et seq.
[29] See to this Diana Schmalz, "The Disparate State of Refugee Protection in the European Union", 82 "Heidelberg Journal of International Law" 2022, p. 529 – 539 (533 et seq.).
[30] Judgment of the ECtHR in Case Appl. Nos 8675/15 and 8697/15 N.D. and N.T. v. Spain, 13 February 2020, para. 213.
[31] Schmalz, cf. footnote 29, p. 535.
[32] Judgment of the ECtHR in Case Appl. No. 12625/17, Shahzad v. Hungary, 8 July 2021, para. 61.; Judgment of the ECtHR in Case Appl. Nos 15670/18 and 43115/18, M.H. et al. v. Croatia, 18 November 2021, paras 293 – 304.
[33] Schmalz, cf. footnote 29, p. 535-6. One should bear in mind that the EU law may have stricter rules.
[34] Some authors try to follow from the right to emigrate the right to immigrate; this is the vision of a World State; cf. Breitenmoser, S., "Migrationssteuerung im Mehrebenensystem", 76 VVDStRL 2017, pp 9 - 48 (19-20).
[35] E.g., Art. 12, para. 4 ICCPR; Art. 3, para. 2 ECHR; see also Klein, E., in "Grenzüberschreitendes Recht – Crossing Frontiers. Festschrift für Kay Hailbronner", Jochum, G. et al. (Editors), "Zum Recht der Einreise in das 'eigene Land", C.F. Müller Heidelberg, 2013, pp. 313 – 326.

a visa, the permit to cross the border and stay in the country for a predetermined time. As the permission of entry is basically a political decision founded on its territorial sovereignty, the State may unilaterally or on the basis of bilateral or multilateral treaties allow border crossing by making visa available at the border itself or even by renouncing a visa requirement. E.g., no entry permits are necessary for nationals of Georgia and Ukraine wishing to travel to Germany, and according to EU law particularly not for the nationals of other EU Member States as an essential element of the establishment of an area of freedom, security and justice without internal frontiers and of the internal market.[36]

Where a right to territorial asylum exists the applicant has a right to enter the State. One has to see, however, that there is no guarantee of such a right in general public international law, but States may commit themselves by their own law or by international agreements to open their doors for asylum seekers. If States do so, they usually qualify this right by conditioning its application. E.g., Art. 16a of the German Basic Law grants asylum only for persons persecuted on political but not economic grounds and excludes its invocation if the applicants enter the country from an EU Member State or another third State where the application of the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights is assured. However, it is necessary to state that neither the Geneva Refugee Convention nor the European Human Rights Convention grant a right to asylum. What they actually do is that they prevent a refugee who has entered the country to be expelled or returned *"to frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"* (Art. 33).[37] We call this the principle of non-refoulement. The European Court of Human Rights, too, has interpreted Art. 3 of the European Convention in the same sense. This means that the non-refoulement principle is applicable not only for the sake of refugees in the meaning of the Geneva Convention but of all persons under the shelter of the European Convention. One may reasonably argue that this principle has attained the status of a peremptory norm of public international law.

To draw here a detailed picture of the asylum system of the EU is impossible. Very broad painting strokes have to suffice. Art. 18 of the EU Charter of Fundamental Rights guarantees the right to asylum only according to the Geneva Refugee Convention and to both of the EU Treaties. The law created on this basis is rather sophisticated and has become additionally enriched by the jurisprudence of the European Court of Justice in Luxemburg. On this basis three different groups of persons can be distinguished who enjoy international protection. First, refugees in the sense of the Geneva Convention; second, persons not being refugees but if returned to their home State, have to be afraid of execution, torture, inhuman treatment or danger of life, especially because of an ongoing armed conflict in the country; they are enjoying so-called "subsidiary protection". Third, there are people who can claim "temporary protection". This status has been established for the special case of a mass influx of persons who, because of a military conflict or massive human rights violations, have to leave their country.[38] All persons belonging to these categories have the right to stay for a basically limited time, but the time limits are different. The EU directive on mass influx of 2001 allows a stay to a maximum of three years.[39] It was activated by the Council for the first time in favour of the Ukraine refugees merely two weeks after Russia's war against their country had started.[40] Yet it was not applied in 2015-16 when 722.000 people tried and finally succeeded to come to Germany over the West Balkan route asking for asylum and the planned distribution of these persons among all EU Member States did not work. Likewise States refused to admit people arriving by boat at the outer borders of the EU like Greece, Italy, Malta and Spain, a problem that could not be solved until today. So far the existing system of the EU has failed.

[36] Art, 3, paras 2 and 3 Treaty on European Union (TEU); Art. 21 Treaty on the Functioning of the European Union (TFEU); Art. 45 Charter of Fundamental Rights of the European Union (EU-CFR).
[37] See also Art. 12, para.3 African Charter on Human and Peoples' Rights which only refers to other international agreements and the national law of the country concerned. The provision does therefore not create a self-standing right of asylum.
[38] Jean-Francois Durieux and Agnès Hurwitz, "How Many Is Too Many? African and European Legal Responses to Mass Influxes of Refugees", 47 "German Yearbook of International Law", 2004, pp. 105 – 159; Walter Kälin, "Temporary Protection in the EC: Refugee Law, Human Rights and the Temptations of Pragmatism", 44 "German Yearbook of Interrnational Law", 2001, pp. 202 – 236.
[39] Directive 2001/55/EC of the Council (20 July 2001), O. J. No. L 2001 (7 August 2001), p. 12. It is interesting to note that there is no legal definition of mass influx, neither in general public international law nor in European law.
[40] Decision 2022/382 of the Council (4 March 2022), O. J. No. L 71 (4 March 2022), p. 1. See Gakis, S., "L'activation de la directive 'Protection temporaire': l'apport d'un instrument sui generis à la protection des personnes déplacées, 33 "Revue Trimestrielle des Droits de l'Homme", 2022, pp. 771 – 794.

Neither the just mentioned EU frontier countries have performed their legal duties nor have the other members shown the necessary solidarity to support them.

Two other points should also be mentioned. States often establish maximum numbers for immigration. There is no general international rule to prohibit such laws, but those acts must not contradict other international legal obligations like treaty commitments or the prohibition of refoulement. The other issue is likewise intricate: the problem of push-backs. We have already dealt with push-backs at sea. But is a State allowed to preventing people asking for asylum or other form of (subsidiary or temporary) protection from entering the country or do they have the right to enter in order to apply and stay there until the application has been duly examined?[41] Personal application in the country itself is not compulsory rather can be done at any place. However, in many cases there will be no opportunity to do so, e.g., when people have suddenly to leave their homes to escape persecution. Offices taking applications could be established just outside the border on the territory of the neighbouring State, if that State agrees to this mechanism. If not, at least according to European law, persons seeking for protection have a right to apply at the border and to stay until their application has been settled. Meanwhile the State of entry has to care for the people, register them, decide in due time on their entitlement to stay or their duty to leave, and implement the decisions. Still, many States have proved not to be able or willing to do so: because of the multitude of protection seekers, the lack of accommodation or, more generally, the lack of good will, etc. But the truth is that too often the States mostly concerned have been left alone with their problems with the result that terrible living conditions in the camps of the incoming people were created. Too often the other EU Members are washing their hands in innocence, merely asking the State concerned to do its job. By the way, the problem does not arise in view of people from Ukraine because they may at any time cross the border of EU States (no visa requirement) for a 90 days stay. Thus there is no need to control at the entry whether the reasons for protection exist or not. Actually, here these reasons evidently exist. But still more: In the Ukraine case even the distribution works quite well – at least up today, because the States on a voluntary basis acknowledge the free choice of residence by the refugees as an act of solidarity.[42]

Generally it might be useful to discuss whether at a certain point the lack of solidarity of the other EU States[43] could entitle the State concerned to close its border and push back all people willing to enter or whether, even more, it could do so if the mass influx is organized in order to endanger the stability of a country. One may think of the sudden opening of the border with Greece by Turkey at the Evros River or the attempt of Belarus, shortly before the Russian aggression against Ukraine started (December 2021), to bring a great number of refugees to the Polish border. Both, Greece and Poland, tried to keep the people away or push them back to Belarus or Turkey.[44] Poland, in order to impede any entry to its territory secured its border with Belarus by a fence. In both cases the two EU members have been charged with violations of EU law because they had prevented people to cross the border and to present their application for asylum. In most domestic legal orders rules for national emergencies exist, and in fact Poland has declared such a state of emergency.[45] Similarly, Art. 78, para. 3, TFEU empowers the Council upon the initiative of the Commission and after consultation with the European Parliament to adopt provisional measures for the benefit of an EU Member State being confronted with an emergency situation by a sudden inflow of nationals of third countries. Such measures were not taken, and the unilateral measures issued and executed by Poland were (most probably) contrary to EU law.[46] However, the blame by the EU and its members was mild, because all of them probably found that Poland politically did the right thing saving the other countries from serious troubles. If States are not able to help another State this State must have the right to protect itself. The complicated EU rules have not always proved to be ready for practice.[47]

[41] No. 27 GCM asks the States for managing the borders in an integrated, secure and coordinated manner; No. 28 GCM asks for certainty and predictability in migration procedures for appropriate individual assessment.
[42] Directive 2001/55/EC, cf. footnote 39, recital 20; see Schmalz, cf. footnote 29, pp. 536 et seq.; Gakis, cf. footnote 40, p. 788.
[43] Cf. Art. 80 TFEU.
[44] See Schmalz, cf. footnote 29, p. 530.
[45] The state of emergency was lifted in June 2022.
[46] In this direction points ECJ (First Chamber), Judgment Case C – 72/22 PPU, 30 June 2022. A proposal to strengthen the idea of solidarity was made and is still discussed among the member States, but it would not change the basic problem that the State of first entry is charged to decide on the asylum application and remains responsible for the persons concerned as long as another State is willing to accept them; see Schmalz, cf. footnote 29, p. 532.
[47] Thym, D., "Zurückweisung erlaubt", Frankfurter Allgemeine Zeitung (FAZ), April 8, 2021, p. 6.

3.2. The status of migrants after arrival

The personal status of migrants arrived at the State of destination can only very roughly be discussed. It depends largely on the conditions of their entry, whether they are regular or irregular migrants,[48] whether they have already received a work permit etc. Persons protected under the EU Mass Influx Directive (e.g., Ukrainian refugees) can stay up to three years, they have access to social aid, medical care, family bringing together, access to education and labour.[49] At any rate all of them are under the protection of the applicable human rights. On the other hand they have to abide by the laws of the State, in particular to exercise their rights only in a peaceful manner, just like any national, too.[50] The Global Compact itself is rather generous, not really making differences between the categories of migrants. This is particularly expressed by its objective 16, namely to "empower migrants and societies to realize full inclusion and social cohesion", meaning i.a. the implementation of "best practices on integration policies".[51] It is not very clear what this quite summary statement could mean and how far integration in a community reasonably should go for irregular migrants who have to leave the country. At any rate integration is a bilateral process, primarily dependent on the preparedness of the migrant to become part of the society where he or she is now living. The attitude of migrants is very different in this regard. Of course, the same is true with the States' societies.[52] Without their support integration cannot work. It is therefore prudent not to strain too much the readiness of the population for help.

The acquisition of the nationality of the State of destination is by no means a necessary part of integration. According to public international law States have the competence to regulate their nationality, but they have to respect some limits to the grant and withdrawal of nationality.[53] The first generation of migrants can acquire nationality only by naturalization on application. The second generation may already profit from the opportunity to receive the nationality by birth if the State has accepted the jus soli rule. Naturalization carrying with it the full status of a citizen should be at the end of an integration process, if the migrant has made clear the intention to stay and is prepared to work for the common good.[54] This is not to be equated with assimilation which always should be a free choice decision and never reached under pressure. Many States have decided to bestow their nationality on foreigners rather liberally.[55] International law is not objecting to this attitude, but is likewise not demanding a jus soli rule or a special time-limit for naturalization if only statelessness for children can be avoided.[56] It is sometimes maintained that the self-characterization to be an immigration country would include a generous assignment of nationality to immigrants. There is some truth in it, but one should not forget that genuine immigration countries as Australia, Canada and the USA very carefully select people who may be useful for the country and do not strain the public (social) budget. Nationality is too a precious good to be thoughtlessly distributed. One may well argue that in pluralistic societies the nationals have not to reflect a closed or uniform people, but the people as the sovereign, which it is at least in true democracies, must be held together by a common tie or bond that consists of a general "yes" to the country, a feeling of a specific belonging together. By the same token, the consequences of dual or more nationalities should be considered.[57] In most cases they do not present too difficult problems, but one should not forget that nationalities have an ordering function for the international relations by drawing limits between States, giving the chance to grant and to receive specific protection by the State of nationality.

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[48] But cf. Judgment of the European Court of Justice in Case C-72/22PPU, preliminary ruling from Lithuania, 30 June 2022, paras 63 ff., 70 ff., 79 ff. illegal persons in Lithuania coming from Belarus asking for international protection must get the opportunity to apply; remarks concerning illegal detainment.

[49] Gakis, cf. footnote 40, p. 772; Schmidt, A., "Die vergessene Richtlinie 2001/55/EC für den Fall des Massenzustroms von Vertriebenen als Lösung der aktuellen Flüchtlingskrise", 35 Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR), 2015, pp. 205 - 212 (208).

[50] To this also GCM No. 32: "observance of national laws and respect for customs of the country of destination".

[51] GCM No. 32.

[52] GCM No. 32. The attitude against discrimination, racism, xenophobia and intolerance against migrants is clearly expressed.

[53] Cf. Advisory Opinion of the Permanent Court of International Justice in Case Nationality Decrees in Tunis and Morocco, 7 February 1923, PCIJ, Series B, No. 4 (1923).

[54] By naturalization the status of denizenship is left; see Thym, D., "Migrationsfolgenrecht", 76 VVDStRL, 2017, pp.169 – 216 (186 et seq.).

[55] Bubrowski, H., "Migration aus einem Guss?", Frankfurter Allgemeine Zeitung, December 1, 2022, p. 2.

[56] See Art. 24, para. 3 ICCPR.

[57] Hailbronner, K. and Weber, F., "Das gemeinsame Band", Frankfurter Allgemeine Zeitung, December15, 2022, p. 6.

3. Terminating the stay in the country

Generally speaking, every person is entitled to leave the country, whenever he or she wishes to go, completely independent of the fact whether the person has acquired the nationality of this State or not.[58]

On the other hand, based on its territorial sovereignty, the State has the power to expel non-nationals from its territory "in pursuance of a decision reached in accordance with law", but not its own nationals.[59] This competence is, however, limited by the prohibition of refoulement and collective expulsion of aliens, particularly important to impede expulsion for discriminatory reasons.[60] In rather many cases expulsion cannot be executed for factual grounds, especially because the person is stateless, the home-state is not known ("sans papiers") or because it refuses, though illegally, to admit its own national. Consequently such persons will further stay in the country, very often for quite a long time and mostly living in rather precarious conditions. Usually, after some time, when the number of those people has enormously increased, their status will be legalized.[61]

The Global Compact for Migration clearly acknowledges the problems just mentioned by stressing the duty of States to readmit their nationals and to offer a real chance of sustainable reintegration. States commit themselves to ensure that the return of all migrants, but in particular of those not having a legal right to stay *"is safe and dignified, follows an individual assessment, is carried out by competent authorities through prompt and effective cooperation between countries of origin and destination, and allows all applicable legal remedies to be exhausted, in compliance with due process guarantees, and other obligations under international human rights law."*[62]

4. Final Remarks

As we have seen "hard" public international law does not very much contribute to the creation of a comprehensive international migration regime, apart from the human rights guarantees on the global and regional plane which grant essential legal protection at all stages of the migration process. On the regional level, however, much more detailed rules can be found; it suffices to relate in this context to the EU law.

On the other hand, the Global Compact for Migration presents a broad array of "soft" law rules claiming to establish common standards for international migration. This political turn is quite interesting, because since long it was usually recognized that "hard" legal obligations based on customary and treaty law and, if possible, enforced by an international judiciary are the best way to achieve satisfying results. Has public international law become overstrained, and are now only more cautious "soft" methods held to be more successful?

Actually, we live in a time where the international order as established since 1945 by the UN Charter and many other international agreements is clearly under pressure. The conduct of aggressive wars, evident breaches of treaty obligations, rapidly growing disrespect to judgments of international courts – all this indicates an alarming renationalization in many areas of international law meaning a regression of the legal development on the global scene. It is not yet decided whether this is a definitive evolution. But it may explain why the States shrink back from creating legally binding instruments and prefer modes of problem solution that gives them more flexibility to go forward or backward without risking the blame of a violation of the law which is a reproach that is even for dictatorships at least inconvenient.

If this assumption is correct we have to ask whether the Global Compact has laid a sound basis for a global migration regime. I cannot deal with all the relevant aspects. I confine myself to examine whether the concept of the Global Compact as such is convincing. Here I have some doubts.

[58] Cf. Art. 12, paras 2 and 3 ICCPR; Art. 13 ICCPR; Art. 12, para. 4 AfCHR, Art: 22, para. 6 AmCHR; Art. 2, paras 2 and 3 Protoc No. 4 to ECHR.
[59] CF. Art. 12, para. 4 ICCPR; Art. 3 Prot. No. 4 to ECHR.
[60] See Art. 4 Fourth Protocol to ECHR.; Art. 12, para. 5 AfCHR expressing a restrictive definition of "collective expulsion"; Art. 22, para. 9 AmCHR.
[61] To the German attempt to establish a new status for formerly only "tolerated" people ("Chancenaufenthaltsrecht") see Bubrowski, cf. footnote 55, p. 2.
[62] GCM No. 37 lit. e.

Certainly, migration is a reality, even a multidimensional reality[63]. The Global Compact, however, seems to present migration as a necessity, even as a cornerstone of sustainable development.[64] This interpretation quite naturally leads to overemphasising the benefits of migration vis-à-vis the difficulties which many States and societies may encounter for very different reasons and might reflect a rather naive multilateralism. It is true that the Compact does not completely overlook the requirement of mutual respect of cultures, traditions and customs,[65] though the impression prevails that all real or possible difficulties must be overcome to flatten the way for a smooth migration. But the picture of migration is much more complex than the Global Compact is painting. E.g., there are differences between migrants who leave their countries for political or economic reasons or because of natural disasters, and particularly between regular and irregular migrants. Of course, the Compact notes the different motivations for migration.[66] However, it is not always clear whether the existing differences are fully reflected by the objectives and commitments that the Global Compact establishes.[67] States might be swiftly overstrained if they are expected to deal with irregular migrants in the same way as with regular migrants apart from their obligation to respect human rights. In many cases the sheer number of irregular migrants mirrors the degree of the loss of the States' control of their territory and touches at its essential interests. In the EU the growing number of irregular migrants is undermining the asylum or Schengen system, and it is for this reason that just today (9 and 10 February 2023) the European Council is convening in Brussels to discuss our topic – and not for the first time.[68]

All these difficulties can only be overcome if the States are willing to cooperate and to tackle international migration as a common task. Though the perspectives just in these times are not very promising, the Compact rightly appeals to all States for more cooperation in the interest of all.[69] "No State can address migration alone."[70] Only solidarity which has evolved, at least in theory, to a very important principle of public international law,[71] can enable us to master the challenges of international migration.[72] But it must be exercised with a sound judgment and an eye for proportion and gradation. The responsibility of all States, those of origin, transit and destination, and of the members of the societies concerned and, certainly, of the migrants themselves must be reasonably balanced. Especially the last aspect has not yet received the necessary attention in the discussions on international migration.[73]

[63] GCM no. 35.
[64] GCM nos 15 and 35.
[65] GCM nos 8, 9 and 32.
[66] GCM no. 18.
[67] E.g., GCM nos 10, 19 (e), 27, 28 and 32; cf. also Tomuschat, cf. footnote 9, p. 213.
[68] T.G., "Schengen in Gefahr?", Frankfurter Allgemeine Zeitung, January 26, 2023, p. 4.
[69] GCM nos 11, 39 and passim.
[70] GCM no. 8.
[71] Wolfrum, R. and Kojima, C. (Editors): "Solidarity: A Structural Principle of International Law", Springer Berlin Heidelberg 2010.
[72] Gakis, cf. footnote 40, pp. 790 et seq.; Thym, cf. footnote 54, pp. 183 et seq.; Uerpmann-Wittzack, R., "Ordnung und Gestaltung von Migrationsbewegungen durch Völkerrecht, 49 Berichte der Deutschen Gesellschaft für Internationales Recht, 2018, pp. 215 – 246 (231-2).
[73] Tomuschat, cf. footnote 9, pp. 221 et seq. But see also the Melilla judgment of the ECtHR, cf. footnote 30.

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